

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Sep 09, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES H.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY ADMINISTRATION,
Defendant.

No. 1:19-CV-03242-SAB

**ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT; GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

Before the Court are Plaintiff's Motion for Summary Judgment, ECF No. 10, and Defendant's Cross-Motion for Summary Judgment, ECF No. 11. The motions were heard without oral argument. Plaintiff is represented by Victoria B. Chhagan, and Defendant is represented by Assistant United States Attorney Timothy Durkin and Special Assistant United States Attorney Lars Joseph Nelson.

For the reasons set forth below, the Court denies Plaintiff's motion, grants Defendant's motion, and affirms the administrative law judge ("ALJ") decision denying disability benefits.

Jurisdiction

On November 3, 2015, Plaintiff protectively filed an application for disabled widower's benefits, a Title II Disability Insurance Benefits and Title XVI Supplemental Security Income Disability benefits, alleging an onset date of July 15, 2013.

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JUDGMENT ~ 1**

1 Plaintiff's application was denied initially and on reconsideration. On
2 March 12, 2018, Plaintiff appeared and testified at a hearing held in Yakima,
3 Washington before an ALJ. Kimberly Mullinax participated as a vocational expert.
4 Plaintiff was represented by Timothy Anderson, an attorney.

5 The ALJ issued a decision on July 25, 2018, finding that Plaintiff was not
6 disabled. Plaintiff timely requested review by the Appeals Council, which denied
7 the request on August 12, 2019. The Appeals Council's denial of review makes
8 the ALJ's decision the final decision of the Commissioner.

9 Plaintiff filed a timely appeal with the United States District Court for the
10 Eastern District of Washington on October 11, 2019. The matter is before this
11 Court under 42 U.S.C. § 405(g).

12 Sequential Evaluation Process

13 The Social Security Act defines disability as the "inability to engage in any
14 substantial gainful activity by reason of any medically determinable physical or
15 mental impairment which can be expected to result in death or which has lasted or
16 can be expected to last for a continuous period of not less than twelve months."

17 42 U.S.C. § 1382c(a)(3)(A). A claimant shall be determined to be under a
18 disability only if his impairments are of such severity that the claimant is not only
19 unable to do his previous work, but cannot, considering claimant's age, education,
20 and work experiences, engage in any other substantial gainful work which exists
21 in the national economy. 42 U.S.C. § 1382c(a)(3)(B).

22 The Commissioner has established a five-step sequential evaluation process
23 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a);
24 416.920(a)(4); *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987).

25 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R.
26 §§ 404.1520(b); 416.920(b). Substantial gainful activity is work done for pay and
27 requires compensation above the statutory minimum. *Id.*; *Keyes v. Sullivan*, 894
28 F.2d 1053, 1057 (9th Cir. 1990). If the claimant is engaged in substantial activity,

1 benefits are denied. 20 C.F.R. §§ 404.1520(b); 416.920(b). If he is not, the ALJ
2 proceeds to step two.

3 Step 2: Does the claimant have a medically-severe impairment or
4 combination of impairments? 20 C.F.R. §§ 404.1520(c); 416.920(c). If the
5 claimant does not have a severe impairment or combination of impairments, the
6 disability claim is denied. A severe impairment is one that lasted or must be
7 expected to last for at least 12 months and must be proven through objective
8 medical evidence. 20 C.F.R. §§ 404.1509; 416.909. If the impairment is severe,
9 the evaluation proceeds to the third step.

10 Step 3: Does the claimant's impairment meet or equal one of the listed
11 impairments acknowledged by the Commissioner to be so severe as to preclude
12 substantial gainful activity? 20 C.F.R. § 404.1520(d); 20 C.F.R. § 404 Subpt. P.
13 App. 1; § 416.920(d). If the impairment meets or equals one of the listed
14 impairments, the claimant is conclusively presumed to be disabled. 20 C.F.R. §§
15 404.1509; 416.909. If the impairment is not one conclusively presumed to be
16 disabling, the evaluation proceeds to the fourth step.

17 Before considering Step 4, the ALJ must first determine the claimant's
18 residual functional capacity. 20 C.F.R. § 404.1520(e). An individual's residual
19 functional capacity is his ability to do physical and mental work activities on a
20 sustained basis despite limitations from his impairments.

21 Step 4: Does the impairment prevent the claimant from performing work he
22 has performed in the past? 20 C.F.R. §§ 404.1520(f); 416.920(e). If the claimant is
23 able to perform his previous work, he is not disabled. *Id.* If the claimant cannot
24 perform this work, the evaluation proceeds to the fifth and final step.

25 Step 5: Is the claimant able to perform other work in the national economy
26 in view of his age, education, and work experience? 20 C.F.R. §§ 404.1520(g);
27 416.920(f).

28 The initial burden of proof rests upon the claimant to establish a prima facie

1 case of entitlement to disability benefits. *Tackett v. Apfel*, 180 F.3d 1094, 1098
 2 (9th Cir. 1999). This burden is met once a claimant establishes that a physical or
 3 mental impairment prevents him from engaging in his previous occupation. *Id.* At
 4 step five, the burden shifts to the Commissioner to show that the claimant can
 5 perform other substantial gainful activity. *Id.*

6 **Standard of Review**

7 The Commissioner's determination will be set aside only when the ALJ's
 8 findings are based on legal error or are not supported by substantial evidence in
 9 the record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)
 10 (citing 42 U.S.C. § 405(g)). Substantial evidence is "more than a mere scintilla,"
 11 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but "less than a preponderance."
 12 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). Substantial
 13 evidence is "such relevant evidence as a reasonable mind might accept as
 14 adequate to support a conclusion." *Richardson*, 402 U.S. at 401. The Court must
 15 uphold the ALJ's denial of benefits if the evidence is susceptible to more than one
 16 rational interpretation, one of which supports the decision of the administrative
 17 law judge. *Batson v. Barnhart*, 359 F.3d 1190, 1193 (9th Cir. 2004). The Court
 18 reviews the entire record. *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985). "If
 19 the evidence can support either outcome, the court may not substitute its judgment
 20 for that of the ALJ." *Matney*, 981 F.2d at 1019.

21 A decision supported by substantial evidence will be set aside if the proper
 22 legal standards were not applied in weighing the evidence and making the
 23 decision. *Brawnerv. Secr'y of Health & Human Servs.*, 839 F.2d 432, 433 (9th
 24 Cir. 1988). An ALJ is allowed "inconsequential" errors as long as they are
 25 immaterial to the ultimate nondisability determination. *Stout v. Comm'r, Soc. Sec.*
 26 *Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006).

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Statement of Facts

The facts have been presented in the administrative transcript, the ALJ's decision, and the briefs to this Court; only the most relevant facts are summarized here. At the time of the hearing, Plaintiff was 55 years old. He earned his GED. He has work experience in roofing and construction. At the hearing, Plaintiff indicated that he has fibromyalgia, affective disorder, personality disorder, COPD, chronic heart failure, anxiety disorder, depression and PTSD. He also complains of back pain, shoulder pain and pain from carpal tunnel.

The ALJ's Findings

At step one, the ALJ found Plaintiff has not engaged in substantial gainful activity since July 15, 2013. AR 20.

At step two, the ALJ found Plaintiff has the following severe impairments: chronic obstructive pulmonary disease (COPD), congestive heart failure (CHF), fibromyalgia, affective disorders and personality disorders. AR 20.

At step three, the ALJ found that Plaintiff's impairments or combination of impairments do not meet or medically equal any Listing. AR 21

The ALJ concluded that since July 15, 2013, Plaintiff has the residual functional capacity to perform:

Light work as defined in 20 CFR 404.1567(b) and 416.967(b) except the follow[ing]. He can frequently climb ramps and stairs. He can frequently handle and finger bilaterally. He must avoid even moderate exposures to fumes, odors, dust, gases, and poor ventilation. He must avoid concentrated exposure to extreme cold, humidity, and workplace hazards, such as machinery and unprotected heights. He must avoid concentrated exposure to loud noise without approved ear protection. He can perform both simple and more complex tasks within the tolerances of competitive employment with customary breaks and lunch. There can be occasional collaborative effort lasting no more than 15 minutes an occurrence. There can be occasional contact with the general public but incidental contact with the public is not precluded. He is not able to perform at a production rate pace (e.g. assembly line work as where the pace is mechanically controlled)

1 but can perform goal-oriented work or where the worker has more
 2 control over the pace. He may be off-task up to 10% over the course
 3 of an 8-hour workday.

4 AR 24-25. At step four, the ALJ found that since July 15, 2013, Plaintiff was
 5 unable to perform any past relevant work. AR 34. The ALJ noted that prior to the
 6 established disability onset date, Plaintiff was an individual closely approaching
 7 advance age. AR 35. On June 14, 2017, his age category changed to an individual
 8 of advanced age. AR 35. The ALJ found that prior to June 14, 2017, considering
 9 Plaintiff's age, education, work experience, and residual functional capacity, there
 10 were jobs that existed in significant numbers in the national economy that Plaintiff
 11 could have performed, including cleaner, housekeeping, and deliverer, outside.

12 AR 35.

13 The ALJ concluded that, prior to the established onset date of disability,
 14 considering the claimant's age, education, work experience, and residual
 15 functional capacity, Plaintiff was capable of making a successful adjustment to
 16 other work that existed in significant numbers in the national economy. AR 36.
 17 Thus, a finding of "not disabled" for the period prior to June 14, 2017 was
 18 appropriate under the framework of the Medical-Vocational Guidelines. AR 36.

19 On the other hand, the ALJ concluded that beginning on June 14, 2017, the
 20 date Plaintiff's age category changed, considering the claimant's age, education,
 21 work experience, and residual functional capacity, there were no jobs that existed
 22 in significant numbers in the national economy that Plaintiff could perform. Thus,
 23 Plaintiff became disabled on June 14, 2017.

24 **Issues for Review**

- 25 1. Whether the ALJ properly evaluate the opinion of Dr. Pellicer?

26 **Discussion**

27 The ALJ gave little weight to the February 2016 opinion of Dr. Mary
 28 Pellicer. AR 33. She concluded that Plaintiff was limited to lift/carry less than 10

1 pounds, stand/walk 2 hours in an 8-hour workday with “more frequent breaks”
2 and sit for about 6 hours in an 8-hour workday with “more frequent breaks” and
3 that Plaintiff could not bend, squat, crawl, kneel, or climb and only occasionally
4 manipulate with his hands. AR 33; AR 1037. Dr. Pellicer’s opinion results in a
5 finding that Plaintiff could perform less than the full range of sedentary work.

6 The ALJ gave Dr. Pellicer’s opinion little weight because it appeared to be
7 based on a one-time physical examination of Plaintiff and it was not consistent
8 with the longitude of the record, including Plaintiff’s presentments during various
9 appointments and examinations and his reported activities of daily living,
10 recreational activities, and work activities, such as doing household chores, yard
11 work, fishing, clamming, playing video games, painting repairing and roofing jobs.
12 AR 33.

13 To reject the uncontradicted opinion of a treating or examining doctor, the
14 ALJ must state clear and convincing reasons that are supported by substantial
15 evidence. *Revels v. Berryhill*, 874 F.3d 648, 654 (9th Cir. 2017) (quotation
16 omitted). If a treating or examining doctor’s opinion is contradicted by another
17 doctor’s opinion, an ALJ may only reject it by providing specific and legitimate
18 reasons that are supported by substantial evidence. *Id.* (quotation omitted). The
19 opinion of a non-examining physician cannot by itself constitute substantial
20 evidence that justifies the rejection of the opinion of either an examining
21 physician or a treating physician. *Id.* (citation omitted).

22 Here, Dr. Platter, a non-examining physician, concluded that Plaintiff could
23 perform light work with additional postural limitations. The ALJ gave the opinion
24 some weight because it was generally consistent with the record as a whole,
25 including the objective findings, Plaintiff’s course of physical treatment,
26 Plaintiff’s performances at examinations, and Plaintiff’s documented daily
27 activities and work activities. AR 32. The ALJ gave some weight to the November
28 2013 opinion of Dr. Shalom Seltzer. AR 32. Mr. Seltzer also concluded Plaintiff

1 Accordingly, **IT IS HEREBY ORDERED:**

2 1. Plaintiff's Motion for Summary Judgment, ECF No. 16, is **DENIED**.

3 2. Defendant's Motion for Summary Judgment, ECF No. 17, is

4 **GRANTED.**

5 3. The decision of the Commissioner denying benefits is **affirmed**.

6 4. The District Court Executive is directed to enter judgment in favor of
7 Defendant and against Plaintiff.

8 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
9 file this Order, provide copies to counsel, and **close** the file.

10 **DATED** this 9th day of September 2020.



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A handwritten signature in blue ink, reading "Stanley A. Bastian", is written over a horizontal line.

16 Stanley A. Bastian
17 Chief United States District Judge
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